IN THE UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Our Lady of the Resurrection Medical Center,

Employer

Case No. 13-RC-22035

- and -

AFSCME Council 31,

Petitioner

EMPLOYER'S ANSWERING BRIEF

On the Petitioner's Exceptions to the Hearing Officer's Report and Recommendations on the Petitioner's Objections to the Election

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EMPLOYER'S ANSWERING BRIEF

AFSCME Council 31 lost a representation election among registered nurses at Our Lady of the Resurrection Medical Center by a count of 159-98. The Union filed objections and a hearing on those objections was held over the course of three days. The Hearing Officer issued a Report and Recommendations concluding that the Union's objections should be overruled in their entirety. The Union has filed exceptions to the Report and Recommendations with respect to Objection Nos. 1-3, 6-8, and 10-11. Pursuant to 29 C.F.R. § 102.69, the Hospital submits this answering brief in opposition to the Union's exceptions.

INTRODUCTION

"It is well settled that '[r]epresentation elections are not lightly set aside." Safeway, Inc., 338 NLRB 525, 525 (2002) (quoting NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991)). Accordingly, the Union's burden of proof in this case is a "heavy one." See Crown Bolt, Inc., 343 NLRB 776, 777 (2005). That burden has not been satisfied.

In deciding whether to set aside an election, the Board must consider the "number of violations, their severity, the extent of dissemination and the size of the unit," as well as the "number of unit employees affected." *See Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001). As the Hearing Officer noted: "The Board's longstanding rule in assessing election objections is that the objecting party must show not only that prohibited conduct occurred but also that, viewed objectively, it interfered with voters' exercise of free choice." (HOR at 31, citing *Frito Lay, Inc.*, 341

NLRB 515, 515 (2004), and *Picoma Indus.*, 296 NLRB 498, 499 (1989).) Moreover, "[t]he party seeking to set aside an election also bears a heavier burden where the vote margin is large." (HOR at 31, citing *Avis Rent-a-Car Sys.*, 280 NLRB 580, 581-82 (1986).)

Here, the Union lost by 61 votes. As a result, the Union must establish serious and widespread objectionable conduct to justify setting aside the result. *See, e.g., Lowe's HIW Inc.,* 349 NLRB 478, 479 n.6 (2007) (objectionable conduct could not have "materially affected the outcome of the election" where the number of voters affected was smaller than the margin by which the union lost); *Werthan Packaging, Inc.,* 345 NLRB 343 (2006) (overruling objections despite evidence of threats and interrogation); *Caron Int'l,* 246 NLRB 1120 (1976) (overruling objection based on threat that was insufficient to affect election).

The Union fell well short of its objective in this regard. Although the Union certainly made many allegations of objectionable conduct, the Hearing Officer justifiably discredited all the Union's key witnesses. The Union's attempt to relitigate these credibility questions should be summarily rejected, given the Board's longstanding policy of substantial deference to a hearing officer's credibility determinations. *See, e.g., Independence Residences, Inc.*, 355 NLRB No. 153, slip op. 1, n.1 (2010). Meanwhile, the remainder of the Union's witnesses merely described events that were perfectly appropriate or, at worst, recounted minor technical infractions that had no effect on the outcome of the election.

The Hearing Officer found no threats, no solicitation of grievances, and no surveillance. He did find one instance when a manager removed a campaign flier from the break room bulletin board, but he correctly found that this had no effect on the election. The flier in question was an *anti-union* flier, and the incident was witnessed only by the Union's most ardent supporter, whose support for the Union never wavered. The Hearing Officer also found, at most, only one instance of improper interrogation, but that involved a single nurse who openly supported the Union and who testified that the incident had no effect on her whatsoever. Again, the Hearing Officer properly found that this had no effect on the ultimate outcome. Finally, he also found that one alleged supervisor (Sherry Chillis) asked a single nurse (Laura Buenrostro) not to share her opinion on the Union. In that instance, the Hearing Officer made a clear mistake. He failed to address the complete absence of any evidence establishing Chillis's supervisory status. In any event, Buenrostro testified that the request by Chillis had no effect on her. She also testified that she continued to freely express her support for the Union, despite Chillis's request. Once again, the Hearing Officer found that this was no basis for setting aside the election. Indeed, these three minor incidents cost the Union precisely zero votes. They are nowhere near sufficient to set aside a 61-vote loss.

Simply put, the Hearing Officer correctly recommended that the Union's objections be overruled in their entirety. There is no basis for a contrary conclusion. Free from any interference, the nurses have let their opinion be known. They do not want to be represented by AFSCME Council 31. The Board should certify that result.

- I. All the Union's Objections Based on Alleged Conduct by Hospital Employees Should Be Overruled.
 - A. Objection No. 1 (Surveillance) Should Be Overruled.

Union Objection No. 1 alleges that Hospital "supervisors, managers and security guards \dots openly conducted surveillance of employees' union activities and support." (HOR at Ex. 1 ¶ 1.) In support of this assertion, the Union made four allegations:

- (1) Hospital security guards looked at Union organizers on one occasion as they distributed materials from a table on the sidewalk in front of the Hospital's main entrance.
- (2) Hospital Vice President Dennis FitzMaurice approached the same table in the same location about ten days later when the Union was distributing pizza to employees and passersby and asked for a slice.
- (3) Sherry Chillis (whose supervisory status the Union never established) once commented to a nurse that she had to go "spy on people about the Union" or "spy on the meeting" or "spy for the meeting" (the Union's witness could not decide what actually was said).
- (4) Betsy Pankau (whose supervisory status the Union also never established) told a nurse the she heard a particular floor of the Hospital was "the Union floor" and then asked the nurse about the location of a Union rally the following weekend so she could pass it along to someone else who was interested.

The Hearing Officer correctly concluded that neither the security guards nor FitzMaurice did anything inappropriate, he soundly discredited the Union's witness who testified about Chillis, and he correctly found both that there was no evidence in the record about Pankau's supervisory status and that her comments were not

objectionable, regardless. There is no basis in the record for the Union's exceptions to these rulings.

1. The Two Security Guards Were Just Doing Their Jobs.

The salient facts of the security guard "incident" are as follows. On June 14, security officer Sharron Collier was asked to check on something unusual, a table set up on the public sidewalk directly in front of the Hospital for purposes of distribution. (Tr. 586-90.) Notably, although the Union set up the same table on subsequent occasions during the election campaign, this was the first time the Union had done so (Tr. 591), making it far from surprising that Collier would be asked to take a look at the unusual situation. As the Hearing Officer noted, "this is part of the normal duties of a security guard." (HOR at 5.) Collier walked outside, saw that it was merely the Union, radioed that everything was "okay," and walked back inside. (Tr. 589-90.) Shortly thereafter, Collier received instructions to check on suspicious activity in the parking garage and radioed fellow security guard Derek Smith to bring a vehicle to the front of the Hospital so they could patrol the garage. (Tr. 590-94.) Smith waited briefly for Collier in front of the Hospital, after which they proceeded to drive across the street, inspect the parking garage, and then return to their normal posts. (Tr. 595-96.)

In sum, Collier and Smith did nothing inappropriate. *See Aladdin Gaming, LLC,* 345 NLRB 585, 586 (2005) (not improper for an employer to witness employees openly engaging in protected activity on or near company property, so long as the

employer's activity is not out of the ordinary). This is precisely what the Hearing Officer found:

The Petitioner has not established that either of the guards engaged in conduct that is out of the ordinary. ... It is not unusual for a guard to inspect the Employer's premises; in fact, this is part of the normal duties of a security guard. Similarly, it is not unusual for a security vehicle to be temporarily parked outside of the entrance to an employer's facility. ... For these reasons, I would recommend that the surveillance allegation pertaining to the security guards be dismissed.

(HOR at 5.)

The Union complains that there is no evidence in the record to support the conclusion that Collier and Smith were engaged in ordinary security guard activity. (Pet. Brief at 6.) This is akin to complaining about the lack of record evidence that the sky is blue. Patrolling the premises and checking on unusual activity is commonly understood to be ordinary security guard behavior, and the Hearing Officer was well within his authority to find as much. All that said, the Union's complaint is badly misplaced, as it was the *Union's burden* to prove that the activity was unusual, not the other way around. *See Crane Co.*, 281 NLRB 979, 980 (1986).

Furthermore, the Union is simply wrong. There is ample evidence in the record that the security guards were merely performing their ordinary duties. Collier testified that security guards routinely patrol the exterior of the Hospital if there is time or if they receive a call about something going on outside the building, and she also testified that they regularly patrol the parking garage. (Tr. 599.) Smith also

testified that he would regularly patrol the exterior of the building and that it was normal to use the security vehicle for that purpose. (Tr. 610.) Further, Smith specifically testified on cross-examination by Union counsel that he was just performing his "normal security activities" on the date in question. (Tr. 612.) The Union's argument on this point is completely without merit.¹

2. There Is Nothing Wrong With Asking for a Slice of Pizza.

Ten days after the security guards were seen merely doing their jobs, the Union was back in front of the Hospital with its table, handing out pizza to employees and other passersby. (HOR at 5-6; Tr. 451-52.) Hospital Vice President Dennis FitzMaurice walked out the front door of the Hospital on his way to the parking garage across the street, stopped by the Union's table, and asked for a slice of pizza on his way to the garage. (HOR at 5-6; Tr. 451-52, 466.) After being denied his request and having a brief exchange with at least one Union representative, FitzMaurice walked to the garage and went home. (HOR at 5-6; Tr. 473-74, 477, 546-47.) Two eligible voters were present at the pizza table at the same time, but as noted above, the mere fact that an employer sees employees openly engaging with a union on a public sidewalk is not objectionable. *See Aladdin Gaming*, 345 NLRB at 586. The fact that FitzMaurice also engaged the Union and even requested a piece of

¹ Maggie Nielsen was the only eligible voter who witnessed the security guards' conduct, and she testified unequivocally that she remained a staunch Union supporter all the way through the election. (Tr. 414-17, 425, 428-31.) As a result, even if the security guards' conduct had been unusual, their conduct did not affect even a single voter. For this additional reason, the security guards' conduct cannot be used to justify setting aside the result of the election. *See, e.g., Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001).

pizza, just like other people on the street, does not alter this conclusion. *See Springfield Hosp.*, 281 NLRB 643, 650-52 (1986) (repeatedly requesting a copy of union literature being distributed is not improper).

The Hearing Officer agreed, finding that FitzMaurice's "actions were not out of the ordinary." (HOR at 6.) In its brief on exceptions, the Union asserts—without any legal support—that it was somehow objectionable for FitzMaurice to put his arm around Ted May, one of the two nurses who was standing near the Union's table. (Pet. Brief at 8.) FitzMaurice and May had actually walked out of the Hospital together, (Tr. 546), but in any case, it is simply absurd to claim that it was "extraordinary" or "unusual" for FitzMaurice to briefly engage May in this manner. FitzMaurice did nothing objectionable, and the Union's complaint about his conduct is no basis for setting aside the election.

3. The Union Has Not Established That Chillis Is a Supervisor or That She Engaged in Surveillance.

Nurse Laura Buenrostro testified that she told Sherry Chillis about the cancellation of a particular bariatric meeting one day, after which Chillis responded that this was "good" because she "was supposed to spy on people about the Union" or "spy for the meeting" or "spy on the meeting"—Buenrostro could not actually recall what Chillis said. (Tr. 377-78, 387-88.) So did Chillis say she was going to spy "on people about the Union" or simply "on the meeting"? Or was it, in fact, "for the meeting"? Was Chillis referring to the bariatric meeting Buenrostro had just mentioned? Or some other meeting? In short, whose "spy" was Chillis supposed to

be, and what was her espionage target? All this is entirely unclear from Buenrostro's testimony, as the Hearing Officer aptly noted when discrediting her. (HOR at 7.) He specifically pointed out the inconsistency and uncertainty of Buenrostro's testimony, as well as the fact that the last two versions of Chillis's alleged comment did not even reference the Union at all. (HOR at 7.)

In its brief, the Union simply ignores Buenrostro's inconsistent testimony on cross-examination as though it never occurred, preferring to cite only the first version of her story, given on direct examination. (Pet. Brief at 8-9.) Surely, ignoring half the record evidence (and two of Buenrostro's three versions of her story) is not a legitimate basis for overruling the Hearing Officer's thoughtful credibility finding. Indeed, there is no basis for overruling that finding at all, and the Board should not do so. *See Independence Residences, Inc.*, 355 NLRB No. 153, slip op. 1, n.1 (2010) ("The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect.")

That said, even if the Hearing Officer had credited Buenrostro, he still could not have found that her testimony established surveillance by a Hospital supervisor. In its post-hearing brief, the Hospital noted that there is actually no evidence in the record to support the Union's argument that Chillis is a statutory supervisor. (Employer's Post-Hearing Brief at 4.) The Hearing Officer inexplicably made no mention of this issue, simply asserting in conclusory fashion that Chillis was Buenrostro's "supervisor." (HOR at 6.) In fact, the only evidence in the record about

Chillis's alleged supervisory status is the following testimony by Buenrostro on direct examination:

- Q. Okay, who do you report to?
- A. Sherry Chillis is my direct supervisor.
- Q. And what is her position?
- A. She is a Director of Surgical Services.

(Tr. 373.) The mere fact that Buenrostro referred to Chillis as her "supervisor" and provided her job title is insufficient to establish supervisory status under the Act. *See, e.g., Airport 2000 Concessions, LLC*, 346 NLRB 958, 968 (2006) (individual's "referral to herself . . . as a supervisor . . . not sufficient to meet the burden of establishing she was a statutory supervisor in the absence of evidence that she possessed any of the enumerated categories of authority in Section 2(11) of the Act"); *Erica Inc.*, 344 NLRB 799, 805 (2005) ("Supervisory status is not determined by title or job classification, but by the nature of the individual's functions and authority in the workplace.") (citing *Mack's Super Markets*, 283 NLRB 1082 (1988)).

Not only does the Union have the overall burden of proof in this matter, but it is the Union's specific burden to establish Chillis's supervisory status, as the party asserting that status. *See Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003) (noting "it is well settled that the burden of proving supervisory status rests on the party asserting that such a status exists") (quoting *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *cf. also Suburban Elec.*, 541 NLRB 1, 2 (2007) ("The party

asserting that an individual is an agent bears the burden of establishing the agency relationship.").

Because there is no evidence that Chillis is a statutory supervisor and because the Hearing Officer properly discredited Buenrostro's testimony in any event, the Board should adopt his finding that Chillis did not engage in improper surveillance of Union activity.

4. The Union Has Not Established That Pankau Is a Supervisor or That She Engaged in Surveillance.

Nurse Kathy Haff testified as follows about an exchange with Betsy Pankau:

Betsy walked up to me and said that she heard this was the Union floor, and she had a question for me. And I said fine, what's your question. I said I don't think it's the Union floor, but fine, what's your question? And then she said she heard there was a rally on Grand Avenue on Sunday.

* * *

.... She said it was a Union rally and that there was a surgical nurse that heard about the rally and wanted more information. Do I know anything about it? And I said, no I don't know anything about a rally. And this was right before Father's Day. I said no I don't know anything about a rally, and I think I would hear about it if there was. I said with AFSCME? And she said yeah. And I said no I don't know anything about it. And she said, okay, well if you hear anything let me know because I'd love to get this girl more information. She has lots of questions. And I said, well if she had lots of questions, tell her she can come to me or I can, I can, she can come outside. We have the tables outside all the time. She can ask her questions out there.

(Tr. 162.) There is no evidence that Haff, who was wearing a "Vote Yes" button at the time, talked to anyone else about this exchange, and Haff testified that it had no effect on her support for the Union. (Tr. 162, 184-86.)

To begin with, the Hearing Officer correctly found that there was no evidence in the record to establish Pankau's supervisory status, so it matters not whether this exchange would have been objectionable if Pankau were a supervisor. (HOR at 8.) As with Chillis, the Union witness in this instance merely testified in conclusory fashion that Pankau is a "supervisor," (Tr. 162-63), but as noted above, neither that nor a reference to Pankau's job title is sufficient to establish supervisory status. See, e.g., Airport 2000 Concessions, LLC, 346 NLRB at 968; Erica Inc., 344 NLRB at 805. In its brief on exceptions, the Union argues that Pankau is a supervisor because she is reflected in meeting minutes as having attended a Medical Executive Committee meeting. (Pet. Brief at 9-10.) This, too, is insufficient, as it tells the Board nothing about Pankau's job duties, evidence of which is required to make a finding of supervisory status. See Aardvark Post, 331 NLRB 320, 321 (2000) ("The facts noted by the hearing officer that Bartlett attended management meetings and that others perceived him as a supervisor are secondary indicia of supervisory status and, because we have not found any primary indicia of supervisory status, cannot be dispositive to finding that Bartlett is a Section 2(11) supervisor.").

The Hearing Officer also rejected the Union's argument that Pankau's exchange with Haff would have constituted improper surveillance even if Pankau were found to be a supervisor. (HOR at 8, n.6.) As the Hearing Officer correctly explained,

Pankau's question about the rally was not actual surveillance of anything, and she never suggested that she was going to attend the rally herself; to the contrary, she merely told Haff that another nurse had heard about a rally (which apparently did not even exist) and that she was asking about it so she could give that nurse more information. (Id.) There is simply nothing wrong with such an exchange, regardless of whether Pankau is a statutory supervisor or not. See, e.g., RCC Fabricators, Inc., 352 NLRB 701, 702 (2008) (no violation when supervisor asked two employees about union meeting where he learned about meeting during break room conversation among employees prior to work and the questions asked would not have caused employees to reasonably assume that their union activity had been under surveillance); Waste Mgmt. of Ariz. Inc., 345 NLRB 1339, 1340 (2005) (no violation when supervisor told a union supporter that he was aware there was a union meeting, where it was not established that the meeting had been held in secret, and the supervisor did not suggest he learned about the meeting in a covert way, or that he had any detailed information about the extent of organizing activity).

Moreover, it is undisputed that Haff's support for the Union was not affected by her exchange with Pankau, so it is undisputed that the conversation did not cost the Union even a single vote. Objection No. 1 should be overruled in its entirety.

B. Objection No. 2 (Interrogation) Should Be Overruled.

In support of Objection No. 2, alleging improper interrogation by Hospital supervisors, the Union once again refers to the aforementioned exchange between Pankau and Haff, along with a second exchange between Chillis and Buenrostro. As

an initial matter, as explained above, the Union has not established that either Chillis or Pankau was a statutory supervisor, so Objection No. 2 should be overruled on that basis alone. (*See* Sections I.A.3 and I.A.4, *supra*.)

Furthermore, the Union never argued to the Hearing Officer that the Chillis-Buenrostro exchange constituted improper interrogation in support of Objection No. 2. (Pet. Post-Hearing Brief at 2.) Accordingly, the Union has waived that argument. *See, e.g., Bally's Atlantic City,* 352 NLRB 316, 325 (2008) ("Issues are waived before the Board if not brought to the attention of the ALJ [who, in *Bally's*, was sitting as a hearing officer on objections]. ... The reasons are obvious and profound. At each stage of the administrative process the agency must be permitted to resolve issues that could stand in the way of efficient, timely, and just administration of the agency's mission.").

Even setting both those issues aside, however, the Union still did not establish objectionable conduct. As the Hearing Officer explained, not every question about union activity is improper. (HOR at 7-8, citing *Rossmore House*, 269 NLRB 1176, 1177 (1984).) In this regard, the Board looks to whether the employee is an open and active union supporter, the background of the questioning, the nature of the information sought, the identity of the questioner, and the place and method of the questioning. (*Id.*) Considering these factors, neither the Chillis-Buenrostro nor the Pankau-Haff exchange was an improper interrogation, even assuming (contrary to the record evidence) that both Chillis and Pankau were supervisors and even

overlooking the fact that the Union never raised the alleged Chillis interrogation before the Hearing Officer.

1. Pankau-Haff

In the case of the Pankau-Haff conversation, the Hearing Officer noted that Haff was clearly an active and open Union supporter—she was wearing a large "VOTE YES" button at the time of the conversation. (HOR at p.8; Tr. 162.) He also noted that Pankau spoke to her at the nurses station, not at any locus of supervisory authority. (*Id.*) Finally, he observed that the question asked was about a Union rally and that Pankau specifically stated that she wanted to pass the information along to another nurse who was looking for information. (*Id.*) Indeed, Haff's testimony reflects a perfectly non-intimidating, friendly exchange between two people at the workplace. (Tr. 162, 185-86.) This was not an improper interrogation. *See, e.g., Cardinal Home Prods. Inc.*, 338 NLRB 1004, 1009-10 (2003) (question not coercive where conversation occurred on plant floor, employee did not hesitate to answer truthfully, and exchange was brief and friendly); *Rossmore House*, 269 NLRB at 1177.

Moreover, as noted previously, Haff was the only witness to the event, there is no evidence that she shared the incident with anyone, and she admitted that her support for the Union was not affected by it. (Tr. 184-86.) In short, it is undisputed that this event did not affect even a single vote in an election the Union lost by 61 votes; therefore, it cannot be cited as justification for setting the election aside. *See, e.g., Bon Appetit,* 334 NLRB at 1044.

In its brief, the Union offers no actual response to the Hearing Officer's conclusion that the alleged interrogation—even assuming Pankau is a supervisor—was a harmless exchange. Instead, the Union asserts in conclusory fashion that Pankau's question "demonstrated unlawful interrogation and objectionable conduct." (Pet. Brief at 12.) No explanation or legal authority is provided. This is insufficient to overcome the Hearing Officer's sound analysis. His recommendation to overrule Objection No. 2 should be adopted by the Board.

2. Chillis-Buenrostro

Turning to Chillis and Buenrostro, Buenrostro described the alleged "interrogation" this way:

[S]he said I saw the purple paper you put up [a Union flier]. She said, what's it to you, yeah, she said what's it to you, and then she said it's not really going to affect you. And I said, I know but I want, I don't like the way nurses are treated, I want nurses to be empowered and I want to leave the profession in a better place than it's been for the young nurses....

(Tr. 388.) The Hearing Officer made no recommendation on this specific issue because, as noted, the Union did not raise that issue with him. Regardless, this was not an unlawful interrogation. Buenrostro was an open Union supporter (Tr. 382), she and Chillis were on "friendly terms" (Tr. 389), the exchange was brief and friendly, and Buenrostro did not hesitate to answer the question truthfully. Given the totality of the circumstances, this was not an improper interrogation. *See, e.g.*, *Cardinal Home*, 338 NLRB 1004, 1009-10 (2003) (question not coercive where conversation occurred on plant floor, employee did not hesitate to answer

truthfully, and exchange was brief and friendly); see also Con-Way Contral Express, 333 NLRB 1073, 1074 (2001) (not unlawful for supervisor to ask employees who were wearing union buttons, "What's this about? The split shift?"). Objection No. 2 should be overruled.²

C. Objection No. 3 (Threats of Changes) Should Be Overruled.

Objection No. 3 concerns statements made by Hospital CEO Martin Judd at an employee forum on June 13, 2011. (Pet. Brief at 13.) The forum was for all employees, not just nurses, and it covered other topics in addition to the Union election. (Tr. 534-36; Employer Ex. 11.) There were three or four nurses in attendance—eligible voters and long-time Union supporters Maggie Nielsen and Cindy Loy, along with one or two unidentified individuals. (Tr. 338, 412-13, 433-34.) Given that their identity is completely unknown, there is no basis for concluding that these one or two other nurses were even eligible voters, as not all nurses in the Hospital were eligible to vote. (Tr. 248-49, 572-74.)

Nielsen and Judd both testified about comments Judd made at the forum concerning how vacation scheduling for nurses could change if there were a union contract in place. According to Judd, he told attendees that "planning [lengthy]

² As discussed below, the Hearing Officer did find the aforementioned exchange between Chillis and Buenrostro to be improper because Chillis also asked Buenrostro to do her a favor and keep her opinion of the Union to herself. (*See* Section I.E., *infra*.) Consequently, it does not matter whether the same conversation could also be characterized as an "interrogation," as such a finding would have been superfluous. One way or the other, it was a single, isolated conversation whose alleged impropriety cannot be presumed without evidence that Chillis is a statutory supervisor (an issue that was *not* established on the record). In any case, whether the conversation was appropriate or not, it is no basis for setting aside a 61-vote loss by the Union. (*See* Section I.E., *infra*.)

vacations [to foreign countries] could become more difficult under a union contract, depending on the nature of that contract and how vacation time is allocated." (Tr. 538.) This is consistent with the statement in Judd's concurrent PowerPoint presentation, which pointed out that nurses "could lose [their] ability to collaboratively set [their] schedule, communicate about [their] issues or concerns with [their] managers and speak for [themselves]." (Employer Ex. 11.) It is also consistent with a message on the topic posted by the Hospital on a website for nurses. (Employer Ex. 4.)

In contrast, Nielsen claimed on direct examination that Judd said: "[Y]ou won't ever be able to speak [to] your management again . . . about time off. . . [I]t will strictly be through the union steward." (Tr. 414.) On cross-examination, Nielsen testified differently:

- Q. Ms. Nielsen, at the employee forum, what Mr. Judd said about time off is that with a union management may lose flexibility in granting time off, correct?
- A. That's correct.
- Q. And what he said is that most likely a contract would be negotiated which would dictate how time off is granted, correct?
- A. He did say that.

* * *

Q. And you don't, sitting here today, remember the exact words he used about vacation scheduling, correct?

A. I remember what I told you, what I just stated, he specifically mentioned nurses taking long periods of time to go to their home countries to visit their families.

(Tr. 426-27.) Moreover, Loy testified at the hearing but did not testify about the forum at all. Her failure to corroborate Nielsen's account further diminishes the credibility of Nielsen's testimony. *See Ithaca Indus.*, 275 NLRB 1121, 1124-25 (1985) (witness not credible where others who witnessed the conduct failed to corroborate witness's story). In fact, Nielsen's own contemporaneous handwritten notes do not corroborate the version she told on direct examination, either. (Employer Ex. 6.) Simply put, Judd's testimony on the matter should have been credited.

The Hearing Officer nonetheless credited Nielsen, finding that "Judd's recollection of the employee forum[] was hazy," that "he could only recall generalities," and that Judd "was only able to remember his specific statement [about vacation scheduling] after receiving prompting from the Employer's attorney"—implying that the Hospital's counsel led Judd improperly. (HOR at 10.) This is an unfair characterization of Judd's testimony. Judd was called as a witness by the Union, which asked him no questions about the employee forum. The Hearing Officer himself then asked some questions about it, and Judd stated that he could "describe what [he] talked about during the employee forums . . . [o]nly in generalities." (Tr. 535.) The Hearing Officer, however, did not follow up to ask for

Judd's general recollection of what he said. Instead, it fell to the Hospital's counsel to ask the question:

- Q. Do you recall discussing anything about how time off would, might, could work if the union won the election?
- A. Yes.
- Q. What did you say about that subject?
- A. I said that because many of our nurses come from foreign countries and plan vacations sometimes up to a year in advance, that planning these vacations could become more difficult under a union contract depending on the nature of that contract and how vacation time is allocated.

(Tr. 537-38.) This was hardly an inappropriate question, and the testimony definitely is not "hazy." This was a clear and straightforward response providing Judd's general recollection of what he said about the topic of vacation scheduling. He did not purport to recollect his exact words, to be sure, but neither did Nielsen.

Although the Board is appropriately very reluctant to overturn a hearing officer's credibility resolutions, in this particular instance, the record evidence is overwhelming that Nielsen's testimony should not be credited—especially given that the Union has the burden of proof in this matter. She was inconsistent on cross-examination (contrary to the Hearing Officer's finding that she "did not vary on cross-examination"), and she was not supported by her fellow witness Loy.

In any event, the Hearing Officer correctly held that the overall content of Judd's statement, even as described by Nielsen, was perfectly acceptable. *See United*

Rentals, Inc., 349 NLRB 190, 191 (2007) ("An employer does not violate the Act by informing employees that unionization will bring about 'a change in the manner in which employer and employee deal with each other"). The Hearing Officer specifically noted Nielsen's admission that Judd told employees a contract would most likely be negotiated that would determine how time off is granted. (Tr. 427, referenced in HOR at 10.) Certainly, it cannot be objectionable for an employer to note the obvious truth that one likely result of unionization would be a collective bargaining agreement covering paid time off procedures.

Finally, it should not be lost on the Board that Nielsen and Loy were the only eligible voters who heard Judd's statements on this topic. No matter what Judd said, Nielsen and Loy remained solidly in the Union's camp (Tr. 336, 424-25), so the Hearing Officer correctly determined that Judd's comments (whatever the content) could not have affected the landslide election result. (HOR at 10.) Indeed, there is no evidence that Judd's comments affected even a single vote. Objection No. 3 should be overruled.

D. Objection No. 6 (Removal of Union Literature) Should Be Overruled.

Emergency Department Manager Betty Albelo once removed a flier posted by Nielsen from a bulletin board in the employee break room, but the Hearing Officer correctly concluded that this had no effect on the election. To begin with, the flier in question was **an anti-Union posting**. (Tr. 419-420; Employer Ex. 5.) The Hospital has no idea why Nielsen posted such a thing, but she admits that she did. (*Id.*)

Obviously, removing a single anti-Union flier from a break room bulletin board is no basis for setting aside an election the Union lost by more than 60 votes. Regardless, the Hearing Officer was correct to find that this single incident (witnessed only by Nielsen, who remained an ardent Union supporter throughout the election) was too isolated and trivial to affect the outcome. (HOR at 12.)

In addition, the Union claims (via Buenrostro, again) that Chillis once removed some Union fliers left in a break room on the sixth floor. Of course, this once again highlights the fatal problem that the Union never established Chillis's supervisory status. (*See* Section I.A.3., *supra*.). More than that, however, Buenrostro admitted that she did not actually witness the removal of the leaflets, and the leaflets were left precisely so they would be taken away by other nurses. (Tr. 383-86.) Accordingly, the Hearing Officer was correct to find that there was no evidence to support the Union's allegation: "Buenrostro stated unequivocally that she did not observe Chillis remove literature from the break room. It is possible to *speculate* that Chillis removed Buenrostro's flyers..., but there is no direct evidence as none of the Petitioner's witnesses actually observed Chillis remove any flyers." (HOR at 11, emphasis added.) Regardless, this was an isolated event insufficient to overturn such a decisive election result. Objection No. 6 should be overruled.

E. Objection No. 7 (Prohibiting Discussion of the Union) Should Be Overruled.

Objection No. 7 relates to three separate events—or non-events, as it were. One involved Haff and an off-duty security guard, another involved Albelo and Nielsen again, and the third once again involved Chillis and Buenrostro.

First, Haff testified that on one occasion she was instructed by an off-duty security officer to stand in the parking garage elevator vestibule to distribute Union leaflets, rather than on the adjacent pedestrian bridge. (Tr. 137-40.) Haff conceded: (1) that she actually preferred the vestibule because of the heat and had stepped slightly onto the bridge only for a brief moment to look down at the street below; (2) that anyone using the pedestrian bridge would pass through the vestibule anyway; (3) that she continued distributing leaflets in the same location that day and returned in subsequent weeks; and (4) that no one from the Hospital ever engaged her on the subject after the exchange with the security officer. (Tr. 137-40, 166-71, 194-95.)

The Hearing Officer correctly found that the exchange between Haff and the security guard "cannot have impacted the results of the election." (HOR at 14.) He noted that the Hospital clearly had no general policy prohibiting employees or Union representatives from distributing handbills, as evidenced by the fact that Haff disseminated handbills on a weekly basis in the same location, Buenrostro left handbills in the sixth floor break room on six to ten occasions, and the Union set up a table in front of the Hospital on numerous occasions. (HOR at 13-14.) What he

failed to mention specifically—but which is equally or even more important—is the fact that Haff's ability to distribute fliers was not affected in the slightest by the security guard's having told her to move into the vestibule. It is undisputed that Haff wanted to stay in the vestibule because of the heat and that every single person who uses to bridge *must* pass through the vestibule. There is simply no basis for disagreeing with the Hearing Officer on this issue, and the Union has offered none in its brief.

Second, Nielsen testified that after she came in and voted on her day off, she spoke briefly with one other nurse named Brooke in the ER break room on her way out. (Tr. 420-22, 432.) Nielsen asked Brooke if she had voted, and Brooke confirmed that she had. (Tr. 420-22.) The rest of the conversation concerned subjects wholly unrelated to the Union, and Nielsen intended to head home after finishing this part of the discussion, but Albelo entered the break room at that point and asked Nielsen to leave. (Tr. 421, 431-33.) In short, Albelo cut off a conversation unrelated to the Union between two individuals who had already voted.

With respect to this encounter, the Hearing Officer aptly described the indisputable truth:

The incident as described by Nielsen does not establish that the Employer prohibited employees from discussing the Union.... According to Nielsen, she was talking to another nurse about golfing, Disneyworld, and vacation when nurse manager Betty Albelo came in to the break room. Although Albelo asked Nielsen to leave the break room, her request did not have anything to do with the Union. Albelo asked Nielsen to leave the break room because she was not scheduled to work at

that time. This did not impact the election in any way since both Nielsen and Brooke had already voted.

(HOR at 16.) The Union argues that Albelo's conduct was nonetheless objectionable because Albelo knew that Nielsen was going to serve as an election observer the following evening. (Pet. Brief at 20-21.) This is a *non sequitur*. Albelo did not interfere with Nielsen's ability to be an observer. Nielsen testified that she did, in fact, serve as the Union's observer during the final polling period, as planned. (Tr. 425.) It is simply beyond dispute that Albelo's exchange with Nielsen had no effect on the election.

Finally, as previously noted (*see* Section I.B.2. at n.2, *supra*), Buenrostro testified that Chillis once asked her to do her a favor and keep her opinion on the Union to herself. (Tr. 379-80, 388.) Of course, Buenrostro also testified that she remained an ardent Union supporter and continued advocating for the Union even after Chillis made this request. (Tr. 382-83, 389.) The Hospital has no qualms with the Hearing Officer's conclusion that a supervisor should not ask a voter to keep her opinion about the Union to herself. (HOR at 14.) The Hearing Officer was incorrect, however, in simply assuming that Chillis is a statutory supervisor. As explained above, there is no record evidence to support that conclusion. (*See* Section I.A.4., *supra*.) In any event, even assuming that Chillis is a supervisor, the Hearing Officer still correctly found that this single statement was insufficient to set aside the election result:

[T]his is the only example of a supervisor making a remark like this. While Chillis' comment may have been

coercive, it is not likely that her comment caused Buenrostro to fear her. Buenrostro stated that Chillis was already aware of her support for the Union. Further, Buenrostro stated that she was on friendly terms with Chillis, Chillis told Buenrostro that she was also a Union supporter, and Buenrostro stated that she wasn't going to let the comment stop her from doing what she thought was right. Buenrostro was the only employee who was subject to the misconduct, although she did tell three other employees about the incident. That being said, the final vote was not close; the Union lost the election by 61 votes. For these reasons, I recommend that this allegation be dismissed.

(HOR at 15.) The Union excepts to this conclusion by asserting in conclusory fashion: "Under the proper standard . . . , which is an objective one, Chillis's statements clearly constituted objectionable conduct." (Pet. Brief at 20.) This is simply wrong. Even assuming that Chillis is a supervisor and that her statement was inappropriate, that still does not make it sufficient to set aside the election. *See, e.g., Lowe's,* 349 NLRB at 479 n.6 (objectionable conduct could not have "materially affected the outcome of the election" where the number of voters affected was smaller than the margin by which the union lost). The Hearing Officer's analysis of the comment and conclusion that it was no basis for setting aside the election is well founded. Objection No. 7 should be overruled.

F. Objection No. 8 (Solicitation of Grievances) Should Be Overruled.

1. There Was No Improper Solicitation of Grievances.

Objection No. 8 involves two issues, an online employee opinion survey and a meeting between Judd and about ten ICU nurses. As the Hearing Officer found, neither was an objectionable solicitation of grievances.

With respect to the employee opinion survey, it is undisputed that: (1) the same survey occurred at all facilities within the Resurrection Health Care system, not just the Hospital involved in the election (Tr. 509-10); (2) a similar survey has been conducted annually at the Hospital for at least ten years (Tr. 507, 568); and (3) the timing of the survey was set before the Union filed its petition for an election (Tr. 566; Employer Ex. 13). As the Hearing Officer found, this is not objectionable. (HOR at 20.) *See Wal-Mart Stores*, 352 NLRB 815, 822 (2008) (employer with general practice of soliciting grievances may continue even after a petition is filed); *cf. also Sam's Club*, 349 NLRB 1007, 1012 (2007) (when a petition is filed, employer must proceed with previously planned wage or benefit adjustments as if the union were not on the scene). The Union has not cited a single case to the contrary and, indeed, has not cited any legal authority at all in support of its challenge to the employee opinion survey.³ (Pet. Brief at 23-24.)

Turning to the meeting between Judd and the ICU nurses, only two witnesses testified about it—Judd and ICU nurse Isabella Ngala. (HOR at 16-17.) It is

³ The Union does cite two cases as alleged support for an argument that the Hospital improperly raffled off an iPad in connection with the survey. (Pet. Brief at 24.) The Union, however, filed no objection alleging an improper grant of benefits to employees. (HOR at Ex. 1.) Accordingly, this argument should not even be considered, just as it was not considered by the Hearing Officer. *See DLC Corp.*, 333 NLRB 655, 656 (2001) (hearing officer may not "consider issues that are not reasonably encompassed within the scope of the objections . . . set for hearing") (quoting *Precision Prods. Group*, 319 NLRB 640, 641 (1995). In any case, the iPad raffle was specifically advertised to encourage participation in the employee opinion survey, not the representation election; one iPad was raffled off at each Resurrection Health Care facility to individuals who participated in the survey. (Tr. 506-07; Petitioner's Ex. 19.) The "raffle cases" cited by the Union, which involved raffles linked to a representation election, are wholly inapposite. *See BFI Waste Sys.*, 334 NLRB 934, 934-35 (2001); *Atlantic Limousine*, 331 NLRB 1025, 1030, n.13 (2000).

undisputed that the primary purpose of the meeting was for the nurses to complain about their allegedly tyrannical boss. (HOR at 17.) It is also undisputed, however, that the Hospital did not solicit these grievances. The Union asserts in its brief that a physician arranged the meeting, but this is blatantly misleading. Ngala admitted that "we, the nurses in ICU, requested to have the meeting with [Judd]." (Tr. 239.) More specifically, Ngala testified:

[W]hen Dr. Hussein came [to the ICU to do his morning rounds], Haifa [Fakhoury, an eligible voter] requested that we wanted to speak to the CEO.... So Dr. Hussein said he was going to talk to Martin Judd and see if we can schedule a meeting.

(Tr. 200.) Judd confirmed that he did not request the meeting and was not even aware of the meeting's purpose until he arrived. (Tr. 555.)

Judd and Ngala dispute the number of nurses who attended and exactly what Judd said to them, but neither dispute is material because it is undisputed that no one solicited any grievances, and that is the Union's objection.⁴

As the Hearing Officer noted:

Although the Petitioner alleges that the Employer solicited grievances, there was no evidence that any solicitation took place. Martin Judd did not seek out the

⁴ On the question of how many nurses attended, the Hearing Officer credited Judd's testimony that there were about ten nurses at the meeting. (HOR at 17-18.) This credibility determination is supported by the Hearing Officer's assessment of the witnesses' demeanor (HOR at 17-18), the inconsistency of Ngala's testimony (she testified that there were more than twenty nurses at the meeting but could not identify more than nine) (HOR at 17), and the fact that the Union submitted a letter to the Region in support of its Objections stating that there were only ten to fourteen nurses present for the meeting (Tr. 224-25). As discussed further below, the Hearing Officer also discredited Ngala and credited Judd regarding what was said at the meeting. (See Section I.F.3., infra.)

ICU nurses' grievances. To the contrary, as all of the witnesses testified, the nurses sought out Judd for a meeting.

(HOR at 18.) The Hearing Officer further noted that Judd had a pre-existing opendoor policy and that Ngala had taken advantage of it previously, before the Union's organizing campaign. (HOR at 18.) Objection No. 8 should be overruled.

2. The Union Did Not File an Objection Regarding Promises.

Implicitly recognizing that there was no solicitation of grievances, the Union's brief on exceptions instead focuses on alleged promises by Judd to Ngala that he would fire the ICU manager. (Pet. Brief at 21-22.) The Union, however, raised no objection based on allegedly improper promises. (HOR at Ex. 1.) Accordingly, it would be inappropriate for the Board to consider this argument. *See Bally's Atlantic City*, 352 NLRB at 325; *DLC Corp.*, 333 NLRB at 656.

3. The Hearing Officer Discredited Ngala, and There Is No Basis for Disturbing That Finding.

Even if the Union had lodged an objection based on alleged promises, the Hearing Officer thoroughly and justifiably discredited Ngala's testimony. (HOR at 18.) The Hearing Officer found her to be a defensive and combative witness with significant memory problems. (HOR at 18.) He found her testimony "confusing," and "inconsistent" and noted her "difficulty recalling specific facts." (HOR at 18.) Indeed, Ngala prevaricated about her own personal history, testifying that she had not been disciplined for communication problems with other employees, despite the fact that she had. (Tr. 210-11; Employer Ex. 17.) She also tried to hide her bias,

denying that she was upset over her recent dismissal from the Hospital and claiming that she did not care about losing her job (Tr. 213), despite having grieved her dismissal (Employer Ex. 15), and despite her visible hostility on the witness stand. Ngala's memory also was demonstrably and seriously faulty, to the point that she could not even recall whether she had been fired on October 1 (Tr. 213), October 31 (Tr. 197-98), or November 2 (Tr. 235), despite the recentness of the event.

This is to say nothing of the way in which her description of events generally grew and morphed with each re-telling. (Tr. 200-04, 213-29, 239.) For example, the Union claims that Judd and Ngala had a separate encounter after the group meeting with ICU nurses, in which Judd supposedly reiterated his promise to fire the ICU manager. (Pet. Brief at 22.) On cross-examination, Ngala described the alleged conversation very confusingly, but certainly differently than the Union posits, concluding with an admission that Judd never promised to fire the ICU manager: "Q. Okay. That's all he said, though, is I'll look out for you? A. Yes...." (Tr. 229.)

Moreover, Ngala admitted that she was merely giving her interpretation of Judd's remarks at the group meeting whereas Judd actually testified to what he recalled saying. (Tr. 202, 204, 221-22, 557.) Judd's testimony about what he actually said is more credible. *See Cintas Corp.*, 344 NLRB 943, 951 (2005) (witness's testimony about her understanding or interpretation of a discussion discredited, given manager's credible testimony about what was actually said). At the same time, the lack of any corroborating witnesses from among the other nine or so nurses who attended the meeting significantly detracts from Ngala's

credibility. *See Ithaca*, 275 NLRB at 1124-25 (witness not credible where others who witnessed the conduct failed to corroborate witness's story).

In short, the Hearing Officer's decision to discredit Ngala is well supported by the record. As noted, the Board's policy is not to disturb credibility findings such as these. *See Independence Residences*, 355 NLRB No. 153, slip op. 1, n.1. Accordingly, there is no basis for the Board to conclude that Judd ever promised to fire the ICU manager or made any other type of inappropriate promise to Ngala. Objection No. 8 should be overruled in its entirety, along with all the other objections concerning alleged conduct by Hospital supervisors.

II. The Union's Objections Based on Alleged Conduct by Physicians (Objection Nos. 10-11) Should Be Overruled.

In Objection Nos. 10 and 11, the Union alleges that certain physicians, acting as agents of the Hospital, improperly interrogated nurses and threatened nurses that the Hospital would close if the Union won the election. To begin with, aside from Dr. David Bordo (whose alleged interrogation of one nurse was a complete non-event), none of the physicians in question is employed by the Hospital, and the Union has not established that any of them acted as agents of the Hospital. In any event, the Hearing Officer justifiably discredited all the allegations of threats and found that the few questions physicians asked were innocuous and did not interfere with the nurses' free choice. Accordingly, he correctly recommended overruling the Union's objections concerning physicians, and the Board should adopt that recommendation.

A. The Physicians Are Not Hospital Agents.

The Union's objections pertaining to alleged conduct by physicians should be overruled because the physicians in question are self-employed private practitioners not employed by the Hospital (except for Dr. David Bordo, whose alleged "interrogation" of Joanna Wegrzynowicz was simply not objectionable). Contrary to the Hearing Officer's recommendation, the Union has not established that these independent physicians were acting as agents of the Hospital when they communicated to nurses about the Union.

To be sure, Hospital administration encouraged the independent physicians to speak with nurses about the Union, but there is no evidence that the Hospital instructed (or had the ability to instruct) them to do so. (Tr. 48; Petitioner Ex. 2.) On the contrary, when a Hospital consultant prepared a draft letter from Dr. Vishnu Chundi to the nurses, Dr. Chundi reacted negatively, stating that he would "write what [he] want[ed] to write." (Tr. 49.) Dr. Chundi then crafted a substantially different letter. (Petitioner Exs. 3, 4.) Merely encouraging third parties to communicate with employees does not create an agency relationship. *See, e.g.*, *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314 (1989) (no agency relationship between union and in-plant organizers even though union encouraged organizers' activity).

Nor did the physicians have apparent authority to speak for the Hospital.

Apparent authority is created through a manifestation by the principal [here, the Hospital] to a third party [here, the nurses] that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent [here, the physicians] to do the acts in question... [E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief.... Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity.

Aljoma Lumber, Inc., 345 NLRB 261, 280 (2005) (quoting Dentech Corp., 294 NLRB 924, 925 (1989). Here, there is no evidence that the Hospital ever "manifested" anything towards the nurses that could have created a reasonable belief that the physicians spoke for the Hospital on union matters. In fact, the evidence is to the contrary. Kathy Haff testified that Hospital administration "made it clear [in an employee forum she attended] that the doctors speak for themselves, and not for the Hospital when they talk about the subject of the Union." (Tr. 181.) Further, management specifically informed Haff and nurse Marieta Macatangay (after they lodged complaints about Dr. Shirish Shah) that, whatever Dr. Shah may have said, he did not speak for the Hospital. (Tr. 174, 357, 618-19; Petitioner Ex. 10; Employer Ex. 20.)

Although the Union focused intently at the hearing (and focuses in its brief) on communications between physicians and Hospital administration about the Union, that is all irrelevant to the issue of apparent authority because no voter ever witnessed it. Similarly, the Hearing Officer focused on assistance the Hospital provided to Dr. Chundi and Dr. Joseph D'Silva in crafting and mailing the

aforementioned letter to nurses (HOR at 34), but again, there is no evidence that even a single nurse knew about that assistance or knew that the Hospital coordinated the mailing. Further, that letter was sent by two doctors in particular, which says nothing about the status of the other physicians in question.

Meanwhile, and just as critical, not a single nurse testified at the hearing that she believed any of the doctors spoke on behalf of the Hospital (as opposed to his own behalf) when commenting on the Union. Without evidence that any nurse actually believed these independent physicians were speaking for the Hospital, there can be no finding that they had apparent authority. Accordingly, Objection Nos. 10 and 11 should be overruled for lack of an agency relationship.

All that said, even if the physicians' conduct could be attributed to the Hospital, those same objections still should be overruled for the following reasons:

B. There Were No Threats To Close the Hospital.

The Union claims that Dr. Shirish Shah told Kathy Haff that "[t]he Hospital's going to close" (Pet. Brief at 37) and asserts that nurse Aura Harris was strolling by the nurses' station on 3 South when she heard Dr. Vishnu Chundi say, "If the Union is allowed to come in, the Hospital will close," (Pet. Brief at 38). The Hearing Officer discredited both Haff and Harris, and the Board should adhere to its longstanding policy of adopting such credibility findings.

To begin with, Dr. Chundi was nothing if not open and free-wheeling in his testimony about discussions with nurses concerning the Union, but he flatly and consistently denied ever telling any nurse that the Hospital would close. (Tr. 36,

43.) Indeed, the Hearing Officer found Dr. Chundi to be "a forthright witness" who "was candid in his testimony, even acknowledging that he asked some of the nurses whether they were going to vote for the Union or not." (HOR at 33.) The Hearing Officer noted that Dr. Chundi "came across as genuine" and "open" during his testimony about his position on the Union. (HOR at 33.) But, as the Hearing Officer observed, he was "adamant when stating that he never told nurses . . . that the Hospital would close if the Union won the election." (HOR at 33.) Accordingly, he credited Dr. Chundi's denials. (HOR at 33.)

Meanwhile, Harris was simply not credible. Indeed, the Hearing Officer concluded that her "testimony merits some skepticism" (HOR at 32), finding her to be "defensive at times" (HOR at 29), and noting multiple problems with her testimony about Dr. Chundi, including the fact that another Union witness who was closer to Dr. Chundi at the time did not corroborate Harris's testimony (HOR at 32).

In reality, the Hearing Officer was far too kind. Harris testified that on June 22, during the shift-change between 3:00 p.m. and 3:30 p.m., she walked by the nurses' station on 3 South and heard Dr. Chundi say: "If the Union is allowed to come in, the Hospital will close." (Tr. 258-60, 279-81.) This was not credible for multiple reasons. First, Harris implausibly claimed not to know what else Dr. Chundi or anyone else said before or after this alleged remark and could not even identify anyone else who was present, despite testifying that she stopped in her tracks and looked directly at Dr. Chundi as soon as he finished making the remark. (Tr. 259-60, 277.) Second, Harris (who works in the first-floor Emergency Department) testified

that she was only on the third floor to deliver a BiPAP machine that was mistakenly left behind when one of her patients was transferred up there. (*Id.*) The problem is, only one of Harris's patients was transferred to the third floor that day, and that happened after 7:00 p.m. (Employer Ex. 21.) Moreover, only one of Harris's patients checked in with a condition that could have required a BiPAP machine, yet that patient's medical record reflects no BiPAP order, and that patient was transferred to the fourth floor several hours before the alleged encounter with Dr. Chundi on the third floor. (Tr. 636-44; Employer Exs. 21, 22.) In short, Harris's testimony is a complete fabrication.

The fabrication was confirmed by the flatly contradictory testimony offered by Marieta Macatangay. Macatangay was the only other Union witness to address this alleged event. She testified that she was at the 3 South nurses' station taking report from another nurse, standing right next to Dr. Chundi for the entire period during which he could have made his alleged threat, yet Macatangay testified that she did not hear Dr. Chundi say any such thing. (Tr. 364.) Macatangay also disputes Harris's testimony that Dr. Chundi was gone by the time Harris supposedly returned to the nurses' station to "report" Dr. Chundi's comment to Macatangay. (Tr. 260-61, 363-65.) In fact, the very notion that Harris "reported" this alleged incident to Macatangay is undermined by Macatangay's failure to mention the incident at all in her sworn affidavit to the Board. (Tr. 355.) In sum, Harris's testimony is disputed in

all relevant respects by both Macatangay and Dr. Chundi and uncorroborated by anyone else. The Hearing Officer properly discredited it.⁵

Similarly, the Hearing Officer also credited Dr. Shah's denial that he ever threatened the closure of the Hospital. (HOR at 31-32.) This is perfectly consistent with the record evidence, as (contrary to the Union's suggestions) Dr. Shah was not at all evasive with respect to questioning about threats, becoming notably more adamant whenever Union counsel suggested that he had threatened nurses, repeatedly insisting that he had "never" done such a thing. (Tr. 78, 81.)

Meanwhile, as the Hearing Officer recognized when he refused to credit her, Haff's story about the alleged threat by Dr. Shah was inconsistent. (HOR at 31-32.) At the hearing, Haff testified that Dr. Shah told her and fellow nurse Justyna Milan that "[t]he Hospital's going to close." (Tr. 142.) But when Haff described this conversation with Dr. Shah in detail to HR Director Ivy McKinley shortly after it occurred, Haff mentioned no such threat—a point the Hearing Officer noted in his credibility determination. (Tr. 156-60, 174-75, 572, 582, Employer Ex. 2.) Furthermore, the Union did not call Milan as a witness to corroborate Haff's account, which alone is sufficient to discredit Haff.⁶ See Ithaca, 275 NLRB at 1124-25. There

⁵ Harris also admitted that Dr. Chundi's alleged "threat" did not make her think the Hospital would close and that her mind was firmly made up to vote for the Union, regardless. (Tr. 276-78.)

⁶ The Union's unsupported speculation that more witnesses did not come forward because they were "afraid to testify" (Pet. Brief at 30) should be ignored by the Board, as there is no evidence to support such an inflammatory assertion. The fact is, the Union could have issued a subpoena to Milan and required her to testify. Its failure to do so is telling.

is no basis for overruling the Hearing Officer's credibility determination here, given Haff's shifting and uncorroborated accounts of her alleged conversation with Dr. Shah.

In any case, Haff admits that she received multiple assurances from Hospital administration after her conversation with Dr. Shah and before the election (both orally and in writing) that the Hospital would not close as a result of the election. (Tr. 149, 174-75, 178-81; Employer Ex. 3.) She also admitted that she never thought the Hospital would close, and as noted previously, she continued to support the Union all the way through the election. (Tr. 179, 185-86.) Meanwhile, Haff did not share Dr. Shah's alleged remark with any other voter (Tr. 193), and the only other person Haff could identify as having heard it was Milan (Tr. 180, 192-93), whom the Union never called to testify. Of course, Milan also would have seen the Hospital's written "no-closure, no-retaliation" guarantee; Haff acknowledged that it was posted in their unit before the election, "for all nurses to see." (Tr. 179; see also Tr. 622-24.) It is simply fanciful to suggest that Dr. Shah's alleged remark, heard by only two nurses and subsequently disavowed by Hospital management had any effect on even a single vote, much less on the overall election result. Cf. Staub Cleaners, Inc., 171 NLRB 332, 333 (1968) (election not set aside where employer repudiated threats of discharge).

In sum, there is no credible evidence that Dr. Shah or Dr. Chundi threatened anyone or that these alleged threats affected even a single vote. Accordingly, the Hearing Officer was correct in recommending that Objection No. 11 be overruled.

C. Alleged "Interrogation" by Physicians Does Not Warrant Setting Aside the Election.

With respect to alleged "interrogation" by physicians, the Union cites two alleged remarks by Dr. Shah, one remark by Dr. Chundi, and one remark each by Dr. David Bordo, Dr. David Fishman, and Dr. Fadi Habib. (Pet. Brief at 28-36.) These alleged remarks by physicians are the crux of the Union's objections, but the Hearing Officer correctly dismissed the Union's allegations. He determined that one of the remarks alleged by the Union never occurred and that the remainder were either perfectly appropriate or insufficient to affect the election. The Board should adopt the Hearing Officer's recommendations, overrule Objection No. 10, and certify the election result.

1. Dr. Fishman Did Not Ask Anyone Anything.

Nurse Cindy Loy testified that during the week of the election, a physician (whom she "believes" to be Dr. David Fishman) saw nurse Sharon Rouette wearing a "Vote Yes" button in the Emergency Department and said to Rouette: "I can't believe you're actually supporting this, you know, this is a, I'm surprised that you would be supporting this." (Tr. 332-33.) According to Loy, "[Rouette] just said, 'Well, what do you mean? You know I would be supporting something like this. It's for patient care.' And that was pretty much it." (Tr. 332.)

The Union styles this as Dr. Fishman having "asked" Rouette about something, but the fact is, he asked her nothing. By definition, there can be no "interrogation" without a question. Dr. Fishman merely expressed his own surprise at Rouette's

opinion—one she certainly felt free to express, given her conspicuous pro-Union button and her confident response to Dr. Fishman's observation. Dr. Fishman's expression of opinion was protected by both the First Amendment and Section 8(c) of the Act. *See* 29 U.S.C. § 158(c); *Children's Ctr. for Behavioral Dev.*, 347 NLRB 35, 35 (2006) (stating that Section 8(c) implements the First Amendment's right to free speech, allowing an employer to express views and opinions on union matters, provided that such expressions do not have a promise of benefit or threat of reprisal or force). Dr. Fishman's statement was not objectionable to begin with and clearly had no effect on the election.

2. Dr. Bordo's Questions to Joanna Wegrzynowicz Were Perfectly Harmless.

Unlike the other doctors at issue in this case, Dr. David Bordo is employed by the Hospital. (Tr. 117.) He is the Medical Director for the Department of Emergency Medicine. (*Id.*) In that capacity, he supervises other doctors, but not the nurses. (Tr. 318.) One day some weeks before the election, Dr. Bordo had the following exchange with nurse Joanna Wegrzynowicz:

He asked me whether I was going to vote in the upcoming election for the union, and I told him that I was unable to vote because I was going to be out of town for that whole week. And he said, he then asked me if I had a chance to vote would I have voted yes or no. And I told him that I would have voted yes.

(Tr. 313.) In fact, Wegrzynowicz was out of town during the election and did not vote. (Tr. 318-19.) Wegrzynowicz also testified that she had a good relationship

with Dr. Bordo, that she had no idea whether he was pro- or anti-Union, and that his questions did not intimidate her at all. (Tr. 318.)

Because Wegrzynowicz was not going to vote regardless of the circumstances, this exchange is irrelevant. It is akin to "interrogating" someone outside the voting unit. Accordingly, the Hearing Officer was correct to conclude that the exchange had no effect on the election whatsoever. (HOR at 30.) Besides noting that Wegrzynowicz did not vote, he also noted that she was not intimidated by Dr. Bordo's questions and that Dr. Bordo asked her how she would have voted only after he knew she was not going to vote anyway. (*Id.*) In sum, given the totality of the circumstances, Dr. Bordo's questions were not even improper, and they would not justify setting the election aside in any case. ⁷

3. Dr. Habib's Questions to Aura Harris Had No Effect on the Election—Not Even on a Single Vote.

Aura Harris testified on direct examination that Dr. Fadi Habib saw her wearing a "Vote Yes" button in the Emergency Department and asked her why she was wearing it. (Tr. 262.) She also testified that he asked her if "everyone in the ER was a 'yes,'" and she told him that they were. (Tr. 263.) Finally, she testified that he

⁷ The record identifies only three other nurses who knew about Dr. Bordo's exchange with Wegrzynowicz—Nielsen, Loy and Rouette. (Pet. Brief at 35.) The Hearing Officer noted that hearing about this innocuous exchange second-hand would have had even less impact than actually experiencing it, but more than that, Nielsen and Loy both remained staunch Union supporters right through the election, so it is obvious that it had no effect on them. (Tr. 336, 424-25.) As for Rouette, she clearly was not affected by it, either, given the "Vote Yes" button she was proudly wearing in the Emergency Department just before the election. (Tr. 332-33.)

asked her if the ER was "where it started." (*Id.*) On cross-examination, she testified differently:

- Q. [After approaching you and noticing your pro-Union button] he expressed to you his opinion that the Union wouldn't do anything beneficial for you, correct?
- A. Right.
- Q. And he expressed to you that he believed that the ER is where the Union campaign started, correct?
- A. He asked if that's where it started.

* * *

- Q. Do you remember anything else that he said or you said?
- A. Well if I were to say that, it would be regarding the patient that we took care of. There wasn't anything more.
- Q. So you don't recall him saying anything else about the Union?
- A. No.

(Tr. 273-75.) Somewhat inexplicably, the Hearing Officer nonetheless credited Harris (despite her having completely fabricated her testimony about Dr. Chundi's alleged threat) based on his conclusion that "[t]here were no inconsistencies during the portion of her testimony relating to Dr. Habib." (HOR at 29.) Clearly, there were inconsistencies.

In any event, credibility aside, this was not an objectionable exchange. *See Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004) (asking employee why he was wearing

a pro-union t-shirt not unlawful). Indeed, Harris scoffed at the notion that Dr. Habib intimidated her and insisted that the conversation had no effect on her support for the Union:

- Q. [T]his conversation with Dr. Habib did not intimidate you or scare you in any way, correct?
- A. Why would it?
- Q. So it did not, in fact?
- A. No.
- Q. Okay. And it didn't change your opinion on the Union one way or the other, right?
- A. My mind was made up. No, it did not change my opinion.

(Tr. 276.) Harris also admitted that she did not relay the incident to anyone else. (Tr. 284.) Real or imagined then, Dr. Habib's interaction with Harris did not affect even a single vote. That much is undisputed. Consequently, the Hearing Officer correctly pointed out that it was no basis for setting aside the election, even assuming that Dr. Habib's questions slightly crossed the line. (HOR at 30-31.)

4. Dr. Shah Did Not Improperly Interrogate Anyone.

The Union presented three witnesses in total (Marieta Macatangay, Isabella Ngala, and Amelita Bedural) to testify that Dr. Shah: (1) asked Haifa Fakhoury and Grace Roy (in the presence of Ngala) whether they were going to vote for the Union and (2) after Macatangay noted that she supported the Union (while wearing a Union pin), incredulously asked her (in the presence of Bedural): "Really?" (Tr. 205, 244-46, 353-54.)

As noted previously, the Hearing Officer found Ngala not to be a credible witness, and he discredited her account of Dr. Shah's alleged interrogation of Fakhoury and Roy.⁸ As discussed previously, Ngala is a serial fabricator. In discrediting her testimony about Dr. Shah, the Hearing Officer noted her demeanor on the stand, her difficulty recalling specific facts, and the inconsistency of her testimony. (HOR at 28.) He also noted that neither Roy nor Fakhoury was called by the Union to corroborate Ngala's testimony. (*Id.*) It also should be noted that the Union's "offer of proof" submitted to the Region regarding Ngala's testimony did not mention Dr. Shah at all. (Tr. 234.)

The Union's only response to the Hearing Officer's credibility determination is to argue that Dr. Shah was not credible, either, and claim that Fakhoury and Roy were probably just "afraid" to testify. To be sure, the Hearing Officer was skeptical of some of Dr. Shah's testimony, but the Hearing Officer specifically discounted Ngala's testimony on this point because of her demeanor on the witness stand and the inherent flaws in her story. (HOR at 28.) This is precisely the kind of credibility decision the Board does not disturb, and it is hardly unusual for a trier of fact to conclude when two witnesses are not particularly convincing that the party with the burden of proof has failed to satisfy its burden. *Cf. National Tel. Directory Corp.*, 319 NLRB 420, 422 (1995) (where ALJ has no basis for determining which of two

⁸ Although the transcript refers to them as "Hyfa Ocurri" and "Grace Troy," a review of the *Excelsior* list shows that the nurses in question are Haifa Fakhoury and Grace Roy. (Petitioner's Ex. 5.)

contrary stories is true, the allegation must be dismissed); *Master Design Co.*, 2002 NLRB LEXIS 562, *18 (2002) (Biblowitz, ALJ) (where witnesses on both sides are equally credible, the General Counsel has not sustained his burden of proof).

Meanwhile, there is no evidence to support the Union's unfounded speculation that Fakhoury and Roy were "afraid to testify." Regardless, the Union could have subpoenaed them and did not. This was properly taken into account by the Hearing Officer as one additional nail in the coffin of Ngala's credibility. *See Ithaca*, 275 NLRB at 1124-25.

Turning then to Dr. Shah's exchange with Macatangay, this is how Macatangay recounted the event on cross-examination:

Q. When he allegedly asked you who was for the union and you said you were, he then asked you, "Really?" Correct?

* * *

When you supposedly told him you were for the union, his response was to ask you, "Really?"

- A. Yes.
- Q. And then he asked you "Really?" again?
- A. Yes.
- Q. And that was the end of the exchange, correct?
- A. He said some words as he left. He said some words that I didn't understand.

⁹ In any event, there is no evidence that one simple question would have affected Ngala, Roy or Fakhoury in the slightest, and even those three votes would be far from enough to have mattered in this landslide election.

(Tr. 353-54.) Macatangay was wearing a pro-Union button at the time. (HOR at 29.)

Despite Dr. Shah's denials and some inconsistencies between Macatangay and

Bedural as to what Shah said, the Hearing Officer credited the assertion that Shah

"ask[ed] Macatangay if she was for the Union." (HOR at 28.)

Macatangay submitted a written, Union-prepared complaint to the Hospital about this exchange. (Petitioner Ex. 12.) It is undisputed that the Hospital subsequently assured Macatangay that Dr. Shah did not speak for the Hospital and that she had a right to support the Union (Petitioner Ex. 13; Employer Ex. 20), and it is also undisputed that Macatangay did continue to openly support the Union. (Tr. 354, 361.) Indeed, she served as a Union observer on election day. (Tr. 354.)

The Hearing Officer concluded that Dr. Shah's exchange with Macatangay was not objectionable. (HOR at 29-30.) He noted that Macatangay was an open and active union supporter at the time (even wearing a pro-Union button during the exchange) who had worked closely and professionally with Shah for many years and considered him to be a generally friendly person. (HOR at 29-30; *see also* Tr. 353-54, 361.) Based on the totality of the circumstances, he found that Shah's incredulous response of "Really?" when Macatangay expressed her support for the Union had no effect on her vote. (HOR at 29-30.) This conclusion is well supported by the record and should be adopted by the Board.¹⁰

¹⁰ As for "dissemination," Macatangay claimed that she spoke with ten to twenty nurses about Dr. Shah's comment. (Tr. 344, 358-59.) Of course, three of the names she gave were Rachel Vardon, Harris and Bedural (who allegedly heard the exchange firsthand), and it is indisputable from the record that Dr. Shah's alleged comments had no effect on their votes

5. Dr. Chundi's Exchange With Amelita Bedural Was Innocuous and Had No Effect on the Election.

Amelita Bedural is the only nurse who testified about alleged "interrogation" by Dr. Chundi. Specifically, Dr. Chundi asked Bedural how she planned to vote. (Tr. 247-48.) Bedural could not identify any other eligible voter who heard this and did not recount the conversation to anyone. (Tr. 247-48, 254.) Bedural specifically testified that the question did not intimidate her; in fact, she "had no problem with him asking." (Tr. 252.) Based on this evidence, the Hearing Officer correctly found that Dr. Chundi's question was not objectionable at all. (HOR at 30.) In any case, it is undisputed that the exchange with Bedural did not affect her vote, and there is no evidence that it affected anyone else's.

Not content to rely on this conversation with Bedural, the Union plays fast and loose with Dr. Chundi's testimony in its brief, stating that Dr. Chundi "admitted questioning 30 to 40 nurses about their Union support." (Pet. Brief at 33.) This is blatantly false, as the Board may have suspected from the absence of any citation to the record following the Union's assertion. What Dr. Chundi actually said, as the Union concedes earlier in its brief, is that there are 30 to 40 nurses who work on a

because they all testified as such. (Tr. 252, 276, 344, 358, 408.) Moreover, Harris did not corroborate Macatangay on this point, and no one else on the laundry list other than Vardon testified at all, so there is no reason to believe that anyone who allegedly heard about Dr. Shah's "interrogation" of Macatangay cared one whit that Dr. Shah expressed a measure of disbelief about Macatangay's support for the Union.

¹¹ She identified an unnamed nurse "from infectious disease" who was present, but there is no evidence that she was an eligible voter. Not all nurses at the Hospital were eligible. (Tr. 248-49, 572-74.)

particular set of nursing units. (Tr. 43.) He never said he questioned them about their support for the Union.

To be sure, on occasion, Dr. Chundi testified somewhat loosely that he asked nurses how they were going to vote if they first engaged him on the subject (Tr. 35-36, 60-62), but viewing his testimony as a whole, what he actually said to how many nurses was entirely unclear. (Tr. 39, 49-51, 63-64.) In then end, Nancy Veto and Eunice Bai were the only two nurses to whom he specifically recalled posing any question about the Union, and he had been on friendly terms with them for fifteen years. (Tr. 63-64.) Even then, it is unclear whether Dr. Chundi asked them how they were going to vote, saw them wearing pro-Union buttons and asked what they thought the Union could do for them, or had a different conversation altogether after they asked for his opinion on the Union. (Tr. 62-65.)

In short, Bedural admits that she had no problem with Chundi's question to her, there is no evidence that Chundi's exchanges with Bai and Veto (whatever they were) had any coercive effect on them, and there is certainly no basis for concluding that Dr. Chundi's exchanges with the three of them improperly swayed an election the Union lost by more than 60 votes. Objection No. 10 should be overruled.

III. The Hearing Officer Did Not Fail To Consider the Alleged "Cumulative" Effect of the Union's Objections.

The Union complains that the Hearing Officer failed to consider the "cumulative" effect of the Union's objections, arguing in its brief that "the evidence established multiple incidents of . . . surveillance . . . , Employer interrogation by supervisors and

managers, Employer threats of adverse changes with respect to vacation scheduling, Employer removal of Union literature from employee break rooms, Employer prohibition on discussing the Union in non-work areas and non-patient care areas ..., Employer solicitation of grievances, and interrogation and threats of hospital closure by physicians" (Pet. Brief at 41.) The problem with this assertion is that the Hearing Officer did not credit the Union's allegations in this regard. He correctly found no threats by anyone of any sort, no surveillance, no interrogation by Hospital management, no evidence that Hospital management removed pro-Union fliers from a break room, and no improper solicitation of grievances. Nor did he find most of the doctors' questions to nurses to be improper interrogation.

In the end, the Hearing Officer found: (1) that Betty Albelo removed one antiunion flier from a break room bulletin board in view of perhaps the most ardently
vocal pro-Union nurse in the Hospital (Maggie Nielsen); (2) that Sherry Chillis
(whose supervisory status was not established in the record) made one
inappropriate comment to Laura Buenrostro about keeping her opinions to herself,
which was shared with only two others and did not affect Buenrostro at all, who
continued to share her opinion; and (3) that Dr. Fadi Habib's questions to Aura
Harris, which were not shared with any other eligible voter, arguably went too far
but admittedly had no effect whatsoever on Harris. Even throwing in Judd's
allegedly improper remarks about vacation scheduling, which were heard by two
eligible voters who remained steadfast Union supporters throughout the election
campaign, this "cumulative" record does not show an improper effect on even a

single vote. That is far from sufficient to overturn an election the Union lost by 61 votes.

The Union's objections are full of sound and fury, signifying nothing. They should all be overruled, as the Hearing Officer recommended. The Hospital's nurses have spoken and have done so without interference or coercion. They do not desire representation by the Union, and that decision should be certified.

RESPECTFULLY SUBMITTED this 10th day of April, 2012.

OUR LADY OF THE

RESURRECTION MEDICAL CENTER

By: ______

Brian M. Stolzenbach

I hereby certify that on April 10, 2012, I caused this answering brief to be served upon the following individuals by e-mail:

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